UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LILLY GEE and DAISY SEWELL, on behalf of themselves and the members of the Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union,	)	
Plaintiffs,	)	
v.	)	**No. 99 C 3577**
TEXTILE PROCESSORS, SERVICE TRADES, HEALTH CARE, PROFESSIONAL AND TECHNICAL EMPLOYEES INTERNATIONAL UNION; and FRANK SCALISH; CHARLES NADDEO; MARSHALL BYNUM; SAL YBARRA; ALBERT ROGERS; MELBINA DICKMAN; FRED HEGWOOD; ALONZO ROBINSON; ANTHONY GRIESE; and JOHN WATSON, Individuals,	)	**Judge Rebecca R. Pallmeyer**
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiffs, individual members of Defendant Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union ("Textile Processors") bring this action to enjoin a merger between Textile Processors and another union, the United Food and Commercial Workers International Union ("UFCW"). The Second Amended Complaint alleges that the Textile Processors entered into, or is about to enter into, a merger agreement (the "Merger Agreement") in a manner that violates the Textile Processors' Constitution and deprives its members of their voting rights under Section 101(a)(1) of the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411(a)(1). Plaintiffs claim, further, that the individual officers of Textile Processors also

named as Defendants in this case[1] breached their fiduciary duties to Plaintiffs in violation of Section 501 of the LMRDA, 29 U.S.C. § 501. This court granted a temporary stay preventing Defendants from consummating the merger with the UFCW. For the reasons set forth below, the court grants Plaintiffs' motion for a preliminary injunction and denies Defendants' motion to vacate or modify the temporary stay.

BACKGROUND

Except as otherwise noted, the following facts are taken from the uncontested portions of Plaintiffs' Second Amended Complaint ("Complaint"), from the evidentiary record created at the hearings before this court, and from the uncontested portions of both Plaintiffs' ("Pls.' Facts") and Defendants' ("Defs.' Facts") Proposed Findings of Fact and Conclusions of Law.[2] **A. General Background**

Textile Processors is an international labor union which represents workers in the laundry and cleaning industry. (Compl. ¶ 7.) At the time this suit was filed, Textile Processors consisted of approximately 22 local unions comprised of 14,030 individual members. (Pls.' Ex. 17, May 12, 1999 Special Convention Roll Call.) Textile Processors is a labor organization as defined in the LMRDA, 29 U.S.C. ¶ 402(i). (Pls.' Facts ¶ 12.) As an independent union, Textile Processors is not protected by AFL-CIO rules which prohibit rival unions from "raiding" the membership of other AFL-CIO

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[1] Frank Scalish, General President and Local 1 Secretary-Treasurer; Charles Naddeo, Secretary Treasurer and Local 10 presiding officer; Sal Ybarra, Second Vice President and Local 75 presiding officer; Albert Rogers, International Representative (appointed); Melbina Dickman, Secretary-Treasurer Local 54; Fred Hegwood, Secretary-Treasurer Local 56; Alonzo Robinson, First Vice President and Local 218 presiding officer; Anthony Griese, International Representative and Local 311 presiding officer; John Watson, International Representative and Local 108 presiding officer. (Compl. ¶ 8.)

[2] Plaintiffs' motion to amend the record to include recent developments in the facts of this case is granted and those facts are incorporated within this opinion.

members or affiliates by conducting membership drives. (Pls.' Facts ¶ 16.)

Beginning as early as August 1997 and through and including May 1999, Textile Processors engaged in merger negotiations with three other unions: UFCW, the Union of Needletrades, Industrial and Textile Employees ("UNITE"),[3] and the Service Employees International Union ("SEIU"). (Pls.' Facts ¶¶ 24-30.) The substance of each of those negotiations included discussions regarding pension compensation for officers and other employees of the Textile Processors.[4] (*Id*. ¶ 30.) On April 22, 1999, Frank Scalish, General President of Textile Processors, issued a call for a Special Convention to vote on a merger with UFCW. (Pls.' Facts ¶ 25, 31; Compl. ¶ 26; Defs.' Facts ¶ 12.) The day before, on April 21, 1999, the Textile Processors' four-member Executive Board (made up of Defendants Scalish, Naddeo, Robinson and Ybarra) met with other local union officials to consider a draft merger proposal from UFCW. (Pl.'s Facts ¶ 29, Ex. 9.) At this meeting, those present also authored and signed a document authorizing the Executive Board to call a Special Convention on ten

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[3] The parties dispute whether UNITE actually ever submitted a formal proposal to Textile Processors. Although it does not appear that UNITE drew up a written proposal, it does appear that it proposed certain terms and conditions to Textile Processors.

[4] On May 6, 1999, Frank Scalish ("Scalish"), General President of Textile Processors, informed UNITE Secretary-Treasurer Bruce Raynor ("Raynor") that a merger between Textile Processors and UNITE would be possible if UNITE would agree to give pensions from UNITE's staff pension to forty-four officers of Textile Processors. (Pls.' Facts ¶¶ 25, 30.) Scalish also informed Raynor that the UFCW was only offering to fund twenty-one of the officers and suggested that Textile Processors would merge with UNITE if UNITE would "take care of more." (*Id*. ¶ 25.) The same day, Scalish faxed a list to Raynor, setting forth the employment start date and the birth date of each of the forty-four officers for whom Scalish sought pension compensation. (*Id*. ¶ 30; Pls.' Ex. 11.) On May 7, 1999, Scalish had a similar conversation with Andy Stern, the President of SEIU, and faxed a similar list to him. (Pls.' Facts ¶ 30; Ex. 12.) Neither UNITE nor SEIU responded affirmatively to Scalish's proposal. (Pls.' Facts ¶ 30.) Scalish testified that had he received an affirmative response, he would have presented merger proposals with those organizations when Textile Processors held a convention on the issue of merging. (*Id*.)

days notice. (*Id.*, Ex. 10.) No notice of the Special Convention was provided to any local union members other than the Executive Board and *ex officio* delegates.[5]

B. The First Special Convention

The Special Convention met on May 12, 1999 and approved the proposed Merger Agreement with UFCW by a vote of sixteen to two. (Pls.' Facts ¶ 31; Defs.' Facts ¶ 12.) No members of Textile Processors, other than the local *ex officio* delegates who received the call for the Special Convention, were advised that the Special Convention was to be held or that the participants in the convention would be voting on a proposal to merge the Textile Processors with the UFCW. (Pls.' Facts ¶ 31.) On May 11, 1999, one day before the meeting of the Special Convention, Named-Plaintiffs Gee and Sewell[6] became aware of the meeting and informed Scalish that they objected both to the Special Convention and the manner in which it was called and asked for an opportunity to put before the Special Convention a proposal for affiliation with UNITE. Scalish did not respond. (Pls.' Facts ¶ 32-3, Pls.' Ex. 1-2.)

Textile Processors' Constitution (the "Union Constitution") neither explicitly allows nor disallows the convening of a Special Convention. (Pls.' Ex. 30, Union Constitution.) It is also silent on procedures to be followed in a merger situation. (*Id.*) Article I, Section 2 of the Union Constitution provides that "all legislative power shall be reserved to the International Union duly convened in session . . . . Its executive and judicial power when not in session shall be vested in the

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[5] An *ex officio* delegate serves as a delegate by virtue of their holding office in a local union. The Union Constitution provides that "[e]lection of a delegate shall not be required in the case of any duly elected officer of a Local Union who is a delegate *ex officio* by virtue of the local constitution and by-laws." (Pls.' Ex. 30, Art. III, § 4.)

[6] Gee and Sewell, the original plaintiffs who were members of Local 46 voluntarily dismissed their claims following Local 46's disaffiliation from Defendant Textile Processors in the fall of 1999. (Pls.' Facts ¶ 7.)

General President and General Executive Board of the International Union." (*Id*., Art. I, § 2.) It mandates a General Convention once every five years, the most recent of which was held in 1995. (*Id*., Art. III, § 1.) Article III, Section 2, of the Union Constitution provides that the General Convention, when called, shall consist of elected delegates, with each local entitled to one delegate for its first two hundred members and one additional delegate for each one hundred additional members. (*Id*., Art III, § 2.) Those delegates are to be elected by secret ballot at a meeting of the local union. (*Id*., Art. III, § 4.) All members in good standing are eligible for candidacy and all members are to be given no less than fifteen days notice of an election. (*Id*., Art. III, §§ 2, 4.)

Article VI § 2 of the Constitution provides that

> all powers of the General Convention when in session shall, when the same is not in session, pass to and vest in the General Executive Board, with the exception of such powers as may herein be specifically delegated to the various officers and subdivisions of the International Union.

Additionally,

> The General President shall render decisions upon questions where the Constitution and By-Laws contain no express provisions for the determination thereof – his ruling upon such questions shall be made in conformity with the spirit and substance of the Constitution and By-Laws and with regard to the equities of the circumstances.

(Article VI § 1; "Interpret Constitution and By-Laws.") On at least one other occasion in 1962, Textile Processors called a Special Convention for the purpose of voting on an affiliation agreement with the International Brotherhood of Teamsters.[7] (Scalish Aff. ¶ 4.)

The Merger Agreement approved at the May 12, 1999 Special Convention guarantees that

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[7] The delegates to that convention approved the merger and Textile Processors was affiliated with the International Brotherhood of Teamsters from 1962 until December 1994. (Scalish Aff. ¶ 4.) The parties did not provide the court with specific information detailing whether or how union members were notified of the Special Convention or whether they were permitted to vote on delegates.

every employee represented by Textile Processors will continue employment under the same terms and conditions, their chosen local leaders will remain in office, and Textile Processors will retain a distinct identity as a separate council of the UFCW. Dues would be directly paid to the UFCW. (Pls.' Exhibit 6, Merger Agreement, Art. V.) Textile Processors would exist as a recognized section of the UFCW so long as its membership remained above 8,500 members. (*Id.*, Art. III.B.) Textile Processors would, however, terminate the Textile Officers' Pension Plan and distribute it, in lump sum payments, to its participants. (Pls.' Facts ¶ 38.) Under the terms of the Merger Agreement, as set forth in Appendices A and B, the following individuals were scheduled to receive money payments from the UFCW staff pension plan.

NAME	ANNUAL PENSION	LUMP SUM
Frank Scalish	$25,000/year	-----
Charles Naddeo	$25,000/year	-----
Sal Ybarra	$25,000/year	$25,000
Albert Rogers	$25,000/year	-----
Melbina Dickman	-----	$194,683
Fred Hegwood	-----	$68,643
Alonzo Robinson	$25,000/year	-----
Anthony Griese	$20,800/year	$20,101
John Watson	$20,800/year	$14,049
Larry Haggin	-----	$47,375
Doris White	-----	$241,617
Sidney Maltz	-----	$77,890

(Pls.' Ex. 6, Apps. A, B.) Furthermore, the merger would result in the termination of the Textile Processors Officers' Pension Plan. The assets of the plan would then be distributed in lump sum payments to the beneficiaries, including Scalish, who was positioned to receive approximately $700,000. (Defs.' Facts ¶ 16.)

Only thirteen of the Textile Processors' twenty-two local unions were represented at the Special Convention. (Pls.' Ex. 17.) The Merger Agreement between Textiles Processors and UFCW

was approved by a vote of sixteen to two. (*Id.*) Of the only eighteen[8] delegates who voted at the Special convention, all were *ex officio* delegates; no other delegates were elected by the local unions to attend the Special Convention. (Pls.' Facts ¶ 31, 34; Defs.' Facts ¶ 18.) No local was represented by its full complement of delegates; indeed, despite the fact that some local unions could have sent more than twenty delegates, none sent more than three delegates, all of whom were *ex officio*. (Pls.' Facts ¶ 34, Pls.' Ex. 17.) Each person listed above, with the exception of Haggin, White, and Maltz, attended the Special Convention.[9] Of the officers positioned to receive some sort of pension payment, only Robinson did not vote in favor in the merger. (Pls.' Ex. 17.) As a group, the officers who were to receive payments and voted yes, represented 55.6% of the votes at the Special Convention. Another 16.6% of the yes votes were made by delegates who came from a local union which had an officer positioned to receive payments under the terms of the Merger Agreement. (Pls.' Facts ¶ 39.) Final approval by the UFCW's International Executive Board was scheduled for May 28, 1999. (Pls.' Facts ¶ 35.)

On that day, before the UFCW board could meet, two members of a Chicago-based local union filed this action to enjoin the proposed merger. As a result of the litigation, the UFCW did not consummate the merger. (*Id.*) To date, Textile Processors continues to pay its own salaries, and dues sent by Textile Processors to UFCW have been returned. (Pls.' Facts ¶ 2.) This court denied Plaintiffs' motion for a temporary restraining order, but soon thereafter commenced evidentiary

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[8] Although nineteen *ex officio* delegates attended the Special Convention, only eighteen actually voted. (Def.s' Facts ¶¶ 17-18.) It appears that one delegate left before the vote was taken. (Pl.'s Ex. 17.)

[9] The delegates in attendance at the Special Convention not scheduled to receive UFCW payments included: Marshall Bynum, Alicia Padilla, James Womble, Thomas L. Rains, Rose Moore, Jean Hansen, Thomas Marrier, Rhonda Nesbit, Carl A. Jones, and Harry Lockman.

hearings on Plaintiffs' motion for a preliminary injunction, taking testimony on six separate days in July and November of 1999.

C. Post-Convention Activity

In October 1999, the General Executive Board of the Textile Processors voted to hold a Second Special Convention on January 9, 2000 to re-vote on the previous decision to merge. (Pls.' Facts ¶ 41, Defs.' Facts ¶ 20.) The Board asked each local to adopt the following plan:

(1) Each local was to hold a special membership meeting before November 15, 1999;
(2) Prior to that meeting, members were to receive a summary and copies of the Merger Agreement, the UFCW Constitution and UFCW Model Local Union By-Laws;
(3) At the meeting, a discussion was to take place along with nomination of delegates to the Second Special Convention;
(4) An election for delegates was to be held if the local union board decided to send a full slate or if it decided to send delegates in addition to the ex officio delegates.

(Pls.' Facts ¶ 41; Defs.' Facts ¶ 20.) Included with materials on the merger was a written explanation of the method by which a local union could go about deciding to send less than a full slate of delegates. (Pls.' Facts ¶ 43; Pls.' Exs. 57-59.) Plaintiff Margie Reed sent Scalish a letter on November 1, 1999 seeking to do a mailing, at her expense, to the entire Textile Processor membership informing them of the possibility of merging with UNITE rather than with UFCW. (Pls.' Facts ¶ 47; Defs.' Facts ¶ 24.) Scalish did not respond until December 2, 1999 and denied her request on grounds that no all-member mailing would be possible because Textile Processors does not maintain a general membership directory. (Defs.' Facts ¶ 24.) On December 8, 1999, Reed's local union voted to merge with UFCW. (1/13/00 Tr. 27-28.) On January 6, 2000, after considering all of Plaintiffs' arguments in support of their Motion, this court denied Plaintiffs' request to enjoin the holding of the Second Special Convention, but did enter a temporary restraining order prohibiting Textile Processors from any exchange of funds or execution of documents that would constitute execution of the merger if

approved.

Since the record on the preliminary injunction closed on November 3, 1999, Textile Processors has lost over three-quarters of its membership. (Pls.' Mot. to Am. Rec., Schwartz[10] Dec. ¶ 11.) A number of local unions have allowed their members to vote on merger or affiliation: between October 23, 1999 and December 22, 1999, 7,195 members in Locals 46, 107, 75, 10, and 150 voted to join UNITE; on December 8, 1999, 247 members in Local 171 voted to merge directly with UFCW; on December 22, 1999, 1,029 members in Local 311 voted against affiliation with UFCW[11]; on January 6 and 7, 2,347 members in Local 218 voted to join the Retail, Wholesale and Department Store Workers Union ("RWDSU").[12] (*Id*. ¶¶ 2-5; Pls.' Reply in Support of Mot. for TRO and Preliminary Inj. and Supplemental Memo of Law, at 7.)[13] Members of Local 1 voted to adopt an amendment to their local constitution requiring a rank and file membership vote before a merger can be approved and executed. (Schwartz Dec. ¶ 5.)[14]

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[10] Arthur Z. Schwartz is counsel for the Plaintiffs.

[11] The actual vote was 601 to 143 against a proposal to affiliate or merge with the UFCW. (Schwartz Dec. ¶ 4.)

[12] According to Plaintiffs, the Local 311 vote is now being contested in a federal district court in Atlanta, Georgia. Pls.' Reply in Support of Mot. for TRO and Preliminary Inj. and Supplemental Memo of Law, at 7.) Plaintiffs do not identify the individual(s) involved in that lawsuit, nor have they explained the nature of the court challenge.

[13] The number of members in each local set forth here refer to the number of members each local was credited as having at the First Special Convention. The actual number of members may have been different when these votes took place several months later.

[14] On November 16, 1999 a district court in the Northern District of Ohio found that Scalish, as head of Textile Processors' Local Union 1 acted contrary to the Union Constitution and the LMRDA when he arbitrarily ruled as "out of order" a number of motions brought by local members to amend the local constitution to affect the Second Special Convention delegation and to provide for rank and file comments on the merger with UFCW. *See DeJesus v. Scalish*, No. 99 CV 2349, (N.D.

(continued...)

D. The Second Special Convention

The Second Special Convention met on January 9, 2000. The delegates to that convention voted unanimously to reaffirm the Merger Agreement. (Defs.' Mot. to Vacate or Modify Temp. Inj., at 3.) The new agreement differed in several respects from the first Merger Agreement.[15] First, the UFCW agreed to allow Textile Processors to retain a council within UFCW, even if the number of members fell below 8,500.[16] (1/13/00 Tr. 32.) The amended Merger Agreement would give each Textile Processor local a Vice President on the Council, each with equal voting strength, regardless of the number of members represented. (*Id.*, at 35.) Because they belonged to locals that had disaffiliated from Textile Processors before the Second Special Convention, certain members listed in the original Merger Agreement were no longer positioned to receive annual pension payments or lump sum payments.[17] (*Id.*, at 32-33.)

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[14] (...continued)
Ohio, Nov. 16, 1999). Scalish himself testified to his intention to keep the plaintiffs at bay with blanket "out of order" rulings, stated his opinion that the membership should not have any say in whether it merges with the UFCW, and referred to Local 1 as "my union." *See id.*, slip op. at 8. In granting the plaintiffs' motion for a preliminary injunction, the court ordered that Scalish convene a meeting of Local 1 where the members of the union would be allowed to vote on proposed amendments to the local constitutions, including an amendment requiring that any merger be approved by a secret ballot vote by rank and file members of the local union. *See id.*, slip op. at 12-13. The court found, however, that Scalish's denial of a proposed motion to forbid Local 1 *ex officio* candidates from attending the Second Special Convention could stand because the proposal would violate the explicit terms of the Union Constitution. *See id.*, slip op. at 11-12.

[15] The Convention delegates did not draw up a new agreement. Instead, the original Merger Agreement was to be modified by amendments. (1/13/00 Tr. 39.)

[16] The compensation paid to the officers of this council-to-be would also be slightly different under the terms of the amended Merger Agreement. (1/13/00 Tr. 34-39.)

[17] Naddeo, Bynum, Ybarra, Robinson and Rogers were deleted from Appendix A; Bynum, Hagen, White, Hegwood and Rogers were deleted from Appendix B. (1/13/00 Tr. 32-33.)
(continued...)

Only five of the remaining twelve local unions sent delegates to the Convention: Local 1, 24, 49, 108 and 304. (1/13/00 Tr. 10.) Local 1 sent eleven delegates, ten of whom were *ex officio* delegates. (*Id*., at 18-19.) Scalish, a delegate from Local 1 who voted in favor of the merger at the Second Convention, remained positioned to receive pension payments under the terms of the Merger Agreement. Local 24 in Seattle sent only one delegate despite having been entitled to send three delegates. (*Id*., at 12.) Melbina Dickman, a delegate from Local 24 who represented 435 votes, and voted in favor of the merger, also remained positioned to receive pension payments under the terms of the Merger Agreement. (*Id*., at 33.) Local 304 in Denver sent in credentials for three delegates, but actually only sent two delegates. (*Id*., at 13.) John Watson, a delegate from Local 108 who represented 136 votes, and voted in favor of the merger, remained positioned to receive pension payments under the terms of the Merger Agreement. (*Id*., at 33.) Of 3,966 potential votes, only 2,371 votes were cast at this Convention. (*Id*., at 10.)

Plaintiffs presented evidence that at least one local known to oppose the merger was excluded from participation in the Second Special Convention. Specifically, Local 311 had previously voted against a proposal to affiliate with UFCW. Although Local 311 accounts for nearly twenty-eight percent of the remaining Textile Processors members, there were no delegates from Local 311 in attendance at the Second Special Convention. (Ex. 105.) Two members of Local 311 testified that members of that local were never notified of the Second Special Convention, never received the information about the proposed merger, and never held a meeting to nominate and elect delegates to the Second Special Convention. (1/13/00 Tr. 52-53, 60-65.) These two members of Local 311 did

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[17](...continued)
The record does not explain what would happen with the funds set aside for payments to those members.

learn about the Second Special Convention, however, and traveled to Cleveland to participate.[18] When they arrived, however, these two members were not allowed into the conference room during the discussion. (*Id*., at 53-55.) The two members were admitted to the meeting approximately one and one-half hours after arriving, after discussion on the merger had been completed. (*Id*.) Upon admitting the two Local 311 members, Scalish directed them not to speak or ask any questions. (*Id*., at 55.) The two Local 311 members heard the vote without participating, and were promptly told to leave because other business needed to be discussed by the Convention delegates. (*Id*.) After returning to Las Vegas, the site of Local 311, the two members began collecting signatures of other members who expressed a desire that their local not merge with UFCW. (*Id*., at 56.) As of January 13, 2000, 780 such signatures were collected. (*Id*., at 57.)

Although there have been significant changes in the number of union members and the identity of the named Plaintiffs, attorneys for Textile Processors members continue to press for an injunction against the UFCW merger. Defendant Frank Scalish himself died in February 2000.

DISCUSSION

Plaintiffs advance a number of arguments in support of an action enjoining the merger between Textile Processors and UFCW. First, Plaintiffs contend that because the Union Constitution does not provide for the holding of Special Conventions, the merger vote conducted through the Special Conventions violated the Union Constitution. Next, Plaintiffs argue that, assuming a Special Convention is permitted by the Union Constitution, both Conventions were held in violation of the LMRDA's provision requiring equal and meaningful voting rights to union members. Finally, Plaintiffs contend that the individual union officers who stand to gain financially from the

[18] UNITE funded the trip to Cleveland for one of the members; the other member funded his own trip. (1/13/00 Tr. 57-58, 66.)

consummation of the Merger Agreement breached their duty of loyalty in negotiating and voting on this agreement.

A. Preliminary Injunction Standard

A party seeking a preliminary injunction must, as part of its threshold showing, demonstrate that (1) it has some likelihood of prevailing on the merits; and (2) due to the absence of an adequate legal remedy, it will suffer irreparable harm if preliminary relief is denied. *See Publications Int'l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 478 (7th Cir. 1996) (citations omitted). When these threshold tests are met, the court must then (3) balance the harm to the non-moving party if preliminary relief is granted against any irreparable harm to the moving party if relief is denied; and (4) consider the interests of the public. *See Pride Communications Ltd. Partnership v. WCKG, Inc.*, 851 F. Supp. 895, 900 (N.D. Ill. 1994) (citing *Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6, 11-12 (7th Cir. 1992)). The court then "'weighs' all four factors in deciding whether to grant the injunction, seeking at all times to 'minimize the costs of being mistaken.'" *Id.* (quoting *American Hosp. Supply Corp. v. Hospital Prods. Ltd.*, 780 F.2d 589, 593 (7th Cir. 1986)).

B. Likelihood of Success

1. Violation of Union Constitution

The parties dispute whether the Union Constitution vests the organization with the power to call a Special Convention. As a matter of law, the Constitution constitutes a contract between Textile Processors and its member and local unions. *See Wooddell v. International Bhd. of Elec. Workers, Local 71*, 502 U.S. 93 (1991). Here, the Union Constitution is silent about the procedures to be followed in determining whether merger is an appropriate action; it is likewise silent about the holding of Special Conventions. Therefore, Plaintiffs argue, the convening of a special meeting to

vote on the issue of merger violates the express terms of the Union Constitution. Defendants argue that because the powers of the General Convention vest in the Executive Board when not in session, the Board has the authority to hold a Special Convention.

It is far from certain whether Defendants violated the Union Constitution when they held a Special Convention which did not use the procedures outlined for the convening of General Conventions. Defendants' reliance on the calling of a Special Convention nearly forty years ago as evidence that the calling of Special Convention was a routine procedure is unpersuasive. Nevertheless, the Union Constitution does not explicitly prohibit Special Conventions, and it may be reasonable to presume from the language of the Union Constitution that the Executive Board maintained some power to convene meetings during the five long years between mandated General Conventions. Indeed, a union's interpretation of its own constitution is entitled to judicial deference; "the interpretation [must be] unreasonable, perhaps even 'patently unreasonable' before [the court] can set it aside." *See Fulk v. United Transp. Union*, 160 F.3d 405, 407-08 (7th Cir. 1998), *cert. denied*, 119 S.Ct. 2400 (1999) (quoting *Air Wis. Pilots Protection Comm. v. Sanderson*, 909 F.2d 213, 218 (7th Cir. 1990)). The court concludes that Plaintiffs have not shown a likelihood of success on the merits of this claim.

2. Violation of Voting Rights

The fact that the executive board may have had the authority under the Union Constitution to call such a Special Convention does not, however, give it a license to arbitrarily determine the procedures for those meetings. While courts properly hesitate before intervening in a union's interpretation of its own constitutional provisions, particularly when those provisions are ambiguous, a court has the duty of assessing whether those interpretations conflict with the LMRDA. *McGinnis*

v. Local Union 710, Int'l Bhd. of Teamsters, 774 F.2d 196, 200 (7th Cir. 1985); *see also Nelson v. International Ass'n of Bridge, Structural & Ornamental Iron Workers*, 680 F. Supp. 16, 21 (D.D.C. 1988).

Section 101(a)(1) of the LMRDA guarantees that "every member of a labor organization shall have equal rights and privileges within such organization . . . to vote in elections or referendums of the labor organization . . . and to participate in the deliberations and voting upon the business of such [Union membership] meetings, subject to reasonable rules and regulations in such organization's constitution and by-laws." 29 U.S.C. § 411(a)(1). Section 101(b) further provides that constitutional or bylaw provisions inconsistent with subsection (a) shall be of no force or effect. *See* 29 U.S.C. § 411(b). The purpose of the Act is to assure the "full and active participation by the rank and file in the affairs of the union." *See McGinnis*, 774 F. 2d at 199 (*citing American Fed'n of Musicians v. Wittstein*, 379 U.S. 171, 182-3 (1964). Whether a union's limitations on voting are acceptable under the LMRDA depends upon a finding that the limitation, while perhaps discriminatory, is nonetheless reasonable. The reasonableness inquiry is one of balancing the anti-democratic effects of the challenged rule and the union interests promoted in its support. *See Alvey v. General Elec. Co.*, 622 F.2d 1279, 1285 (7th Cir.1980) (citing *Local 3489, United Steelworkers of Amer., AFL-CIO v. Usery*, 429 U.S. 305, 320 (1977)). Reasonableness is also interpreted in light of the general policy against judicial interference in the internal affairs of unions. *See McGinnis*, 774 F.2d at 200.

Plaintiffs would likely prevail on a claim for violation of their voting rights with respect to the Second Special Convention.[19] In holding the Second Special Convention Defendants followed the

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[19] For purposes of this preliminary injunction ruling only, the court will focus on the alleged violation of voting rights with respect to the Second Special Convention only. The court agrees with Plaintiffs that, by holding the Second Special Convention to cure the defects of the first

(continued...)

Union Constitution's procedural requirements for the holding of a General Convention - e.g., as outlined above, Defendants directed the Local Unions to provide notice to the general membership of the upcoming vote, provide members with copies of the Merger Agreement, and to hold meetings to nominate and elect delegates. By adopting this plan, the Executive Board created de facto rules providing for notice, an opportunity to discuss the proposal, and a right to vote. Section 101(a)(1) does not create a right to vote where no express provision for such a vote exists in the Union Constitution. *See, e.g.*, *McGinnis*, 774 F.2d at 200 n.1. Nevertheless, once a union has provided its members with the right to vote, that right must be extended in a meaningful and non-discriminatory manner. *Id.* at 199. Thus, once it had adopted the plan of adhering to General Convention requirements, the Executive Board was bound by its own new de facto internal rules, and therefore required to extend the vote on an equal basis and in a meaningful manner.

Plaintiffs assert that the procedures violate the spirit if not the form of the rules adopted for the holding of the Second Special Convention because Defendants distorted the information sent out and because Defendants also denied Plaintiffs an opportunity to communicate their views. *See Blanchard v. Johnson*, 532 F.2d 1074, 1078 (6th Cir. 1976) (affirming injunction entered where union members were forced to vote on an affiliation agreement without full disclosure and under misleading circumstances); *Sheldon v. O'Callaghan*, 497 F.2d 1276, 1281-82 (2d Cir. 1976) (LMRDA prohibits union officials, in a referendum on a new union constitution, from denying opponents the opportunity to mail information to members). The court agrees.

First, the plan required only that Textile Processors receive a copy of the Merger Agreement

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[19](...continued)
Special Convention, Defendants have in effect conceded that the first Special Convention was held in violation of Textile Processors' members voting rights. (Pls.' Facts ¶ 2.)

as it was drafted in May 1999. Certain material changes were made in the terms of this Agreement, of which members were not aware prior to the Second Special Convention. In particular, the amended Merger Agreement provided each local, regardless of its membership size, equal voting strength within the governing Council. In order for the members' vote on the merger to be meaningful, this change in governance of the Council and the diminution in the strength of the larger locals should have been made known to Textile Processors members before they elected delegates to the Second Special Convention.

Second, the plan included instructions on how a local could send less than a full slate of delegates to the Second Special Convention. Standing alone, the sending of less than a full slate of delegates and/or only *ex officio* delegates would not appear as an obvious violation of the LMRDA voting provisions. However, Defendants have offered no explanation as to why it was ever suggested that a local send less than the full complement of delegates. Nor did Defendants explain to the general membership the purpose for such amendments. Under the circumstances presented here, it appears that if a local were to send only *ex officio* candidates, it would be sending the exact same individuals to the Second Special Convention as to the First Special Convention, thus presumably guaranteeing a re-affirmance of the original merger vote.

While Defendants are correct that on its face, the sending of only *ex officio* candidates does not violate the LMRDA, Defendants' behavior here reflects a larger pattern to prevent new voices from participating in the re-affirmance of the vote and thus a denial of the democratic voting rights enshrined in the LMRDA. Scalish denied Reed's request that information about merger with UNITE be mailed to all members. Despite the fact that Scalish directed each local to send information to all members about UFCW, Scalish told Reed that he had no means for making all members aware of

UNITE's proposal.[20] Moreover, the record contains information that at least one large local, Local 311, never received information about the Second Special Convention, and further that Scalish disallowed members from Local 311 to participate in the discussion on the merger once two of them appeared at the Second Special Convention.[21] On these facts, coupled with Scalish's blatant attempts to stifle democratic processes in his own local,[22] this court finds that Plaintiffs have met the threshold burden of proving they would likely prevail on their claim that Defendants failed to extend the merger vote on an equal basis and in a meaningful manner.

3. Breach of Fiduciary Duty

As Defendants rightly note, given the ambiguity in Section 501 of the LMRDA[23] and unsettled

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[20] Defendants urge that Reed has no standing to make this argument because her local union has since disaffiliated from Textile Processors. The court notes, however, that Reed remained a member of Textile Processors up until December 8, 1999, after most of the locals already had rank and file votes on the UFCW merger.

[21] Granted, these two Local 311 members were not duly elected delegates and therefore not permitted to vote. Nevertheless, Defendants offer no reason, once they appeared at the Second Special Convention, these members were denied the opportunity to be heard and to present their signature petition. Although the record is not clear when Scalish learned that Local 311 had no delegates present because that local was not informed of the upcoming vote nor held local elections to send delegates, the court presumes that he was made aware of that fact when the two Local 311 members appeared at the Second Special Convention. The court concludes he should have withheld a vote on the merger as soon as he was made aware of that fact.

[22] *See supra*, note 14.

[23] Section 501 of the LMRDA provides:

> [t]he officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person , taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party . . . in any matter connected with his duties and from holding or

(continued...)

questions of law regarding the scope of fiduciary duties under that section, it may be difficult for Plaintiffs to establish as a threshold matter that they would likely prevail on their claim of self-dealing. Defendants' conduct surrounding whether to submit proposals from UNITE and SEIU are self-dealing to the extent those decisions were apparently premised solely on the status of the officers' pension plans. The notion that union officers made a merger decision based on their personal financial interests is, at a minimum, unappealing. It is unclear, however, whether an officer would be in breach of the fiduciary duties imposed by Section 501 if he or she were motived to vote for merger because he was expecting to receive a payment of funds from the acquiring union. Notably, whether Plaintiffs, as members of Textile Processors, even have standing to sue for breach of fiduciary duty is not a settled issue; the pension funds at issue are the property of the UFCW, and are funded by dues paid by members of UFCW, not members of Textile Processors.

Federal Circuit Courts are split on the issue of whether Section 501 mandates fiduciary responsibility only with respect to the money and property of the acquired union or whether the statute adopts broader common law notions of acting at all times in the union's, rather than the leadership's, best interests. *Compare Gurton v. Arons*, 339 F.2d 371 (2nd Cir. 1964) (applying narrow construction of Section 501 and holding that it imposes fiduciary duties only with respect to the union's own money and property) *with Pignotti v. Local No. 3 Sheet Metal Workers' Int'l Ass'n*, 477 F.2d 825 (8th Cir. 1973) (holding that the fiduciary duties of union officers under Section 501 extend beyond just the safeguarding of the union's own funds and property). The Seventh Circuit has not

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(...continued)

> acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization.

29 U.S.C. § 501.

conclusively settled on either interpretation. While it has questioned whether *Gurton*'s strict interpretation accurately reflects the intent behind the LMRDA, it has not yet followed other circuits in concluding that Section 501 embodies broad common law responsibilities. *See, e.g, Hood v. Journeymen Barbers, Hairdressers, Cosmetologists & Proprietors Int'l Union of Amer.*, 454 F.2d 1347, 1354 (7th Cir. 1972) (holding that self-dealing prohibitions in Section 501 apply to misuse of union funds and property by union officials); *Trustees of the Operative Plasterers' & Cement Masons' Local Union Officers & Employees Pension Fund v. Journeymen Plasterers' Protective & Benevolent Soc., Local Union No. 5*, 794 F.2d 1217, 1220-21 (7th Cir. 1986) (declining to adopt either narrow scope of Section 501 espoused by *Gurton* or broad scope of Section 501 espoused by *Pignotti*).

For present purposes, however, this ambiguity is irrelevant. Having found that Plaintiffs have made a threshold showing of success on the merits concerning voting violations at the Second Special Convention, it is unnecessary for the court to conclude whether Plaintiffs would prevail on their Section 501 claim in deciding whether to grant a preliminary injunction.

C. Irreparable Harm

Defendants argue that Plaintiffs cannot suffer irreparable harm by allowing them to consummate the merger with the UFCW because this court can simply undo that merger and restore the status quo should the merger be determined to be improper. In support, Defendants cite a single case from the Eastern District of New York to the effect that if an election is found improper, the results of the election could be voided and another election held. *See Weiss v. Torpey*, 987 F. Supp. 212, 217 (E.D.N.Y. 1997). *Weiss*, however, is distinguishable from the case at bar. Rather than a merger between two independent unions, *Weiss* dealt with a single union's decision to streamline

operations by consolidating two local unions, only one of which was independently chartered. *See id.* at 215. As a result of the consolidation, one of the local unions, the Metal Trades Branch, would no longer be permitted to hold separate elections for its own officers. *See id.* Opposing the consolidation, the Metal Trades Branch filed a motion to enjoin the action, alleging that the consolidations deprived its members of the right to self-determination and the right to be represented by their own members. The two local unions were previously governed by the same President, Vice President and Secretary-Treasurer and they shared the same office. *See id.* at 214. Equally important, the one local had already exercised some measure of control over the Metal Trade Branch's funds. *See id.* at 217. Having first found the plaintiffs very unlikely to prevail on the merits, the court noted that the Metal Trades Branch would not suffer any irreparable harm. *See id.* The court concluded that if ultimately the court found the consolidation to be illegal, the upcoming officers elections could be voided. *See id.*

The Merger Agreement between Textile Processors and the UFCW envisions much more than the ratification of the *de facto* relationship represented in *Weiss*. While the structural relationships created by Textile Processors will remain intact, Textile Processors will otherwise dissolve as an organization. As this court noted in its decision to temporarily enjoin the consummation, while the Textile Processors may continue to exist structurally, as a practical matter it will be impossible to reconstitute the dissolution and distribution of the Textile Processors' pension fund or to disentangle funds from the pension and other funds if Textile Processors dissolves. Because this court could therefore not effectively undo the merger, a denial of the injunction would cause irreparable harm to Plaintiffs' interests.

On an individual basis, the court also believes that Plaintiffs, particularly those who are

members of Local 311 and Local 1, will suffer an irreparable harm. By a clear majority, the members of Local 311 voted against merging with UFCW. They were never informed of the Second Special Convention, and had no delegates represent them at that convention. If they are forced to merge with UFCW against their express wishes, their vote would effectively be rendered meaningless. Moreover, Frank Scalish testified that if the merger were to be approved, he would even not allow Local 1 to vote on the issue, but would instead order that they merge with UFCW, in apparent defiance of a new amendment to the local constitution requiring that the issue of merger be put to a rank and file vote. (1/13/00 Tr. 17-18.) These individual Plaintiffs would be further irreparably harmed by the consummation of the merger.

D. Balancing of Harm

Having found that Plaintiffs have met the threshold showing for entry of a preliminary injunction, this court now balances the harm to Plaintiffs against the harm to Defendants if the injunction is issued improvidently. This court recognizes that preserving the status quo as it now stands does harm to Defendants to the extent that it continues to expose Textile Processors' few remaining locals to possible raids by UNITE. While Defendants contend that these raids adversely affects Textile Processors' ability to provide full service to its membership, they have not explained what these services are or how and to what extent they would be negatively affected. The harm caused to Defendants by continuing the injunction simply cannot survive a balancing against the irreparable harm to Plaintiffs caused by a violation of their rights to a meaningful and equal right to vote.

E. Public's Interest

Finally, Defendants offer no public policy reason supporting the denial of a preliminary injunction. Defendants aver generally that federal labor laws are centered on the principle that labor

stability is in the public interest and that an injunction invites disruption in the industries in which the Textile Processors represent employees. They claim that the denial of the injunction "would insure the continued stable relations between Textile Processors and the employers with whom its locals have collective bargaining agreements." (Defs.' Response to Pls.' Facts, at 25.) While the record does not specifically address the relationship between Textile Processors and individual employers of its members, the facts suggest that these relationships have been anything but stable. Indeed, this assertion runs contrary to Defendants' various pleas that the Special Convention was necessary as an emergency response to the danger posed by UNITE and Defendants' own argument as to why it would be caused irreparable harm should the injunction be granted. While stability in labor relations is a valid public policy concern, Defendants have offered no basis on the record before this court implying that labor stability would be worse than it is now if the injunction is granted.

F. Motion to Strike Evidentiary Material

On January 3, 2000 Plaintiffs moved to strike evidentiary material that Defendants attached to their Response to Plaintiffs' Proposed Findings of Fact and Conclusions of Law. These materials, consisting of a document entitled "Independent Investigation of Allegations of Self-Dealing" and another document purporting to chronicle the important events of this case, were not produced in discovery nor formally admitted into the record. However, the author of the report testified with respect to the contents of the report in a hearing before the court on January 13, 2000. Accordingly, the motion is denied with respect to the report, and granted with respect to the chronology.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion to Amend the Record (Docs. 51-1, 2) is granted. Plaintiffs' Motions for a Temporary Restraining Order and Preliminary Injunction (Docs. 2-1, 32-1,

2, 46-1, 2) are granted. Accordingly, Defendants' Motion to Vacate or Modify the Temporary Stay (Docs. 54-1, 2) is dismissed. Further, Plaintiffs' Motion to Strike Evidentiary Material (Doc. 50-1) is denied in part and granted in part. Finally, Plaintiffs' Motion to Quash Subpoenas (Doc. 58-1) is denied without prejudice pending a status conference on this case.

Status conference is set for Friday, April 14, 2000, at 9:00 a.m. Plaintiffs are directed to provide a proposed order preliminarily enjoining the UFCW merger. Defendants are directed to be prepared to propose an appropriate bond.

ENTER:

Dated: March 28, 2000

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REBECCA R. PALLMEYER
United States District Judge